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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

CAROL WEBER et al.,

Plaintiffs and Appellants,

v.

ROLLAND FITZGERALD et al.,

Defendants and Respondents.

2d Civil No. B151432
(Super. Ct. No. 227954)
(Santa Barbara County)

Carol and Murray Weber appeal a judgment entered in favor of defendants Barbara and Rolland Fitzgerald following a jury trial. We affirm.

FACTS

On October 5, 1995, Carol Weber entered into a five-year written agreement with the Fitzgeralds to lease commercial property at 201 South Milpas Street in Santa Barbara.¹ The Webers intended to open a retail wine store and the property was attractive in part because it provided 29 parking spaces for the wine store and other building tenants.

On February 9, 1996, the Webers opened "East Beach Wine Company," a discount wine store that sold premium wines and hosted wine tastings. During 1996, 1997, and 1998, patronage of the store, total sales, and mail-order sales generally

increased. With few exceptions, the wine store was open seven days a week, twelve hours a day.

Other Santa Barbara stores such as Trader Joe's, Von's in Montecito, Costco, and Gelsons also sold wine. The Webers did not consider these stores as competitors, however, because East Beach Wine Company carried a wide selection of "really fine wines, less known" and sold its wines at a discount.

The Fitzgeralds also owned adjacent undeveloped property at 209 South Milpas Street. In 1999, they planned to develop this property by constructing a building that was partly residential and partly commercial. On May 9, 1998, the Fitzgeralds notified the Webers by letter that "the parking and planters [of 201 South Milpas Street] are going to be modified and a new building will be constructed on the [adjacent] vacant lot"

In June 1998, construction commenced. Construction workers used the parking spaces at 201 South Milpas Street to store construction materials and to park construction vehicles. The 14 parking spaces behind the wine store were used to store grading dirt, sand, a construction dumpster, lumber, construction materials, and a portable toilet, among other items. Subcontractors parked their vehicles in the front and rear parking lots, in a fashion that Rolland Fitzgerald conceded was "helter skelter." From time to time, a construction vehicle, concrete mixer, or delivery truck would block the parking aisle to perform construction or to deliver construction materials. Murray described the use of the wine store parking lot as "unbelievable" and "[j]ust mayhem." Although construction did not continue on weekends or holidays, construction debris and equipment occupied parking spaces then. The newly constructed building also encroached upon three parking spaces.

The Webers "immediately" noticed a loss of customers and a drop in sales after construction began. On December 16, 1998, during the wine store's busy season, the Webers had only six parking spaces available for customers. They then brought an

¹ Hereafter we refer to plaintiffs individually as "Carol" and "Murray," not from

action against the Fitzgeralds for breach of contract. The Webers also sought and obtained a temporary restraining order precluding use of parking spaces for storage of construction materials or for parking by construction workers. After parking problems persisted due to violations of the restraining order, the Webers sought and obtained a second temporary restraining order in March 1999.

After one year of construction, the building on the adjacent property was completed. The adjacent property provided no parking for its tenants, however. In 1997, the Santa Barbara City Planning Commission had approved shared use of the parking lot at 201 South Milpas by tenants of the new building.

For several months after June 1999, tenants of the new building constructed improvements that affected available parking. Thereafter, through a four-month period ending in November 1999, there were major street improvements on South Milpas Street, the Milpas freeway exit, and the nearby intersection. During this time, the city also "tore up" South Milpas Street to "change[] the direction of the sewer."

In September 1999, the Webers negotiated to sell East Beach Wine Company. Murray testified that the 201 South Milpas Street location "no longer work[ed]." In February 8, 2000, the Webers sold the wine store for \$190,000 plus cost of inventory.

At trial, the Webers testified that loss of parking due to adjacent construction caused a loss of customers, resulting in lost profits. Murray opined that the wine store lost approximately 5,300 customers overall in 1998 and 1999, due to the construction. He described the loss as "dramatic[]." Murray estimated that East Beach Wine Company averaged 27 daily customers in 1997, 26 daily customers in 1998, and 18 to 20 daily customers in 1999. Kevin Law, a former employee of East Beach Wine Company, testified that customer counts did not increase following completion of construction of the adjacent building and South Milpas Street through the sale of the wine store in 2000.

Murray estimated that a customer spent, upon average, 30 minutes in the wine store. He also testified that 12 parking spaces were usually available both to the store and to the other tenants of the property from June 1998 until he sold the business in February 2000. (A beauty salon and a mail order underwater optical business were the other tenants.) He added that occasionally only 3 or 4 parking spaces were available due to the construction.

Murray testified that from 1997 through 1999, inflation of 30 percent increased the cost of wine. East Beach Wine Company raised prices approximately 25 percent through that period.

David Newton, a Westmont College Professor of Finance, testified as an expert concerning lost profits suffered by East Beach Wine Company and the effect of lost profits on the sales price of the business. He opined that the wine store lost \$100,000 in gross profits due to loss of parking.

Martin Kavinsky, a certified public accountant, also testified concerning lost profits. Kavinsky opined that other factors contributed to the loss of customers but that parking was also a factor.

Prior to trial, the trial court granted summary adjudication, concluding that the Fitzgeralds breached the contractual provision "to maintain the parking provided in the lease, available and unobstructed, for the use of the business tenants." At trial, the court gave instructions on causation and damages. The jury returned a special verdict deciding that the Fitzgeralds' breach of contract did not cause damages to the Webers nor did the Webers suffer a partial eviction from the property.

The Webers appeal and contend: 1) insufficient evidence supports the finding of lack of causation; 2) insufficient evidence supports the finding of no partial eviction due to loss of parking; and 3) the trial court denied Murray due process of law by not permitting him to participate at trial.

DISCUSSION

I.

The Webers argue that overwhelming evidence establishes that East Beach Wine Company suffered damages from loss of parking due to construction on the adjacent property. They point to their testimony, the testimony of longtime employee Law, and the opinions of expert witnesses Newton and Kavinoky. The Webers assert that the Fitzgeralds did not present contradictory evidence of causation nor the existence of damages.

In assessing a claim of insufficient evidence, we review the entire record, resolve all evidentiary conflicts, and draw all reasonable inferences in favor of the decision of the trier of fact. (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1203.) The trier of fact alone determines the credibility of witnesses. (*Id.*, at p. 1204.) We do not substitute our evaluation of a witness's credibility unless the witness's testimony is physically impossible or inherently improbable. (*Ibid.*)

Moreover, the trier of fact is not bound by the opinion of an expert witness. (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923.) The jury "may disregard the expert's opinion, even if uncontradicted, and draw its own inferences from the facts." (*Ibid.*)

However convincing the evidence of causation appears to the Webers, the evidence did not convince the jury. It is the plaintiff's burden in a civil action to establish the elements of the cause of action by a preponderance of the evidence. (*Beck Development Co., supra*, 44 Cal.App.4th 1160, 1205 [in a civil action, the burdened party must convince the trier of fact that the existence of a particular fact is more probable than its nonexistence].) The jury was entitled to accept all or part of a witness's testimony, reject an uncontradicted expert opinion, and draw its own reasonable inferences from the evidence. (*Kennemur v. State of California, supra*, 133 Cal.App.3d 907, 923.) We presume that evidence unfavorable to the judgment was rejected by the trier of fact for lack of sufficient verity. We do not reweigh the evidence nor do we substitute our own

reasonable inferences for those drawn by the trier of fact. (*Beck Development Co., supra*, at p. 1203.)

Here the jury may have drawn the reasonable inference that the existence of 12 parking spaces provided sufficient parking for 27 daily (preconstruction) customers at the wine store. It also may have reasoned that inflation, competition, or other factors caused a drop in daily customer counts. There was evidence at trial of inflation and competition, and the jury may have drawn common sense inferences from this evidence. We cannot conclude, as a matter of law, that the construction-related parking and activities in the parking areas proximate to the wine store were the cause of damages to it.

II.

The Webers assert that insufficient evidence supports the jury finding of no partial eviction due to the Fitzgeralds' removal of parking spaces.

The Webers had the burden of proving "an actual partial eviction" from "a substantial portion of the premises."² The jury rejected the evidence favorable to the Webers' theory of partial eviction and drew reasonable inferences supporting no substantial interference with the Webers' possession. We do not evaluate witness credibility nor do we reweigh the evidence. (*Beck Development Co., supra*, 44 Cal.App.4th 1160, 1204.) Neither do we substitute our reasonable inferences for those drawn by the trier of fact. (*Ibid.*) The Webers failed to carry their burden of proof.

To the extent the Webers argue that evidence exists of a "non-substantial partial eviction," they did not request a jury instruction regarding that theory. They have waived the claim on appeal.

² The trial court instructed: "An Actual Partial Eviction occurs when a tenant is deprived of the beneficial enjoyment of a substantial portion of the premises due to the intentional acts of the landlord. [¶] In determining whether an eviction is 'substantial' you may consider the extent of the interference with the tenant's use and enjoyment of the property. Whether such interference is so substantial as to constitute a sufficient eviction as to justify the tenant's non-payment of rent is a question of fact for you to decide. One element in deciding whether the interference is substantial is whether the tenant remained

III.

Murray, an accountant and tax attorney, argues that the trial court denied him due process of law because it did not permit him to "fully participat[e]" at trial.

The trial court did not err. It granted Murray standing as a plaintiff. Plaintiffs were represented by counsel at trial. Trial counsel advised the court that he, not his client, was "handling the trial" and that Murray would cross-examine only one witness. Murray did not move to act as his own attorney instead of or in addition to trial counsel. He cannot complain now.

The judgment is affirmed. Respondents are entitled to costs on appeal.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

in possession of the premises." Plaintiffs submitted this special instruction to the trial court.

James W. Brown, Judge
Superior Court County of Santa Barbara

Murray Weber and Carol Weber, in pro. per, for Plaintiffs and Appellants.

Koletsky, Mancini, Feldman & Morrow, Marc S. Feldman and Raymond C.
Dion for Defendants and Respondents.